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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

MIDWEST MOTOR EXPRESS, INC.,
MME, INC., MIDNITE EXPRESS, INC.
and EXPRESS CARTAGE, INC.,
Petitioners,

v.

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

INTRODUCTION

Midwest Motor Express, Inc., MME, Inc., Midnite Express, Inc. and Express Cartage, Inc. ("Midwest") file this reply brief in response to the brief in opposition filed by Central States Southeast and Southwest Areas Pension Fund ("Central States"). Midwest incorporates the points and authorities raised and argued in its Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

I. THE COURT BELOW IMPROPERLY DECLINED A FACTUAL INQUIRY ON A JURISDICTIONAL QUESTION IN A CASE WHICH ON ITS FACE WAS NOT RIPE FOR FILING.

Central States mischaracterizes the nature of the issues presented to the Eighth Circuit on the question of the first-filed rule. The question before the Eighth Circuit was whether both the U.S. District Court for the Northern District of Illinois and the U.S. District Court for the District of North Dakota had subject matter jurisdiction over their respective cases.[1] A transfer under the first-filed rule assume jurisdiction in both courts involved in the transfer. The transferring court has a duty to examine this assumption of jurisdiciton before making the transfer. Clearly, the Illinois court did not have subject matter jurisdiction over a case which, on its face, was not ripe for filing.[2] Therefore, the case should not have been transferred.

Central States contends that the two complaints were appropriately considered by the Eighth Circuit in an analysis of the first-filed rule. *See* Brief in Opposition, p. 5. Central States then argues it was appropriate for the Eighth Circuit, in applying the first-filed rule, to fail to make a factual inquiry into the jurisdictional basis of the Illinois complaint simply because it was filed in another circuit. It is precisely the Eighth Circuit's failure to make that determination that made it impossible for that court to apply the first-filed rule in a meaningful

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[1] Midwest will hereinafter refer to the Northern District of Illinois and its case as the "Illinois court" and "Illinois action," and to the District of North Dakota and its case as the "North Dakota court" and "North Dakota action".

[2] *See* Central States' complaint, paragraph 10, App. F, p. 19-20, where the Complaint, filed on April 26, 1994, admits that Central States issued its Notice and Demand for Payment of Withdrawal Liability *on the same date,* April 26, 1994.

fashion. The argument turns the first-filed rule into one of mechanical application that might as well be made by a clerk, not by a judge.

In its Brief in Opposition Central States argues that

> [s]ince both complaints arose from the same subject matter, they presented an apt case for application of the Eighth Circuit's 'first-filed rule' to determine which of these two courts should decide the case. *See Northwest Airlines, Inc. v. American Airlines, Inc.*, 989 F.2d 1002, 1006 (8th Cir. 1993) (footnote omitted).

However, the "first-filed" rule is a rule of *judicial* construction under Section 1404(a) which permits that district court whose jurisdiction first attached to hold its jurisdiction to the exclusion of other courts until the first court has performed its duty and, for the convenience of witnesses and parties, to transfer the latter action to the court where the first action is pending. *Northwest Airlines, Inc. v. American Airlines, Inc.*, 989 F.2d 1002, 1004-07 (8th Cir. 1993). As always in federal court, jurisdiction is of primary importance. The precondition to transfer is that *both* district courts have jurisdiction. This prerequisite is so important in fact, that the "first-filed" rule is, in reality, a "first-to-obtain-jurisdiction" rule. As recently formulated by the Eighth Circuit itself, the first-filed rule is a rule that "gives priority, for purposes of choosing among possible venues when parallel litigation has been instituted in separate courts, *to the party who first establishes jurisdiction.*" *Northwest*, 989 F.2d at 1006 (emphasis added).

As set forth in its petition (*See* pp. 15-16), Midwest was the party which first established jurisdiction. By declining a factual inquiry on a jurisdictional question pending in a case which on its face was not ripe for filing, the decision below conflicts with decisions by seven other circuits regarding the appropriate scrutiny to be used during a threshold examination of subject matter juris-

diction. *See* Petition for Certiorari, pp. 16-20. Not surprisingly, Central States fails to explain why the judicial analysis should be less rigorous in a transfer context than in the ordinary federal case. Common sense and judicial economy suggest that scrutiny of jurisdictional allegations is more, not less, important in transfer cases, particularly when a race to the courthouse is involved.

Case law does not limit jurisdictional examinations to only those instances where the cases are filed in district courts in the same circuit. The mere fact that a matter is filed in a court in another circuit cannot keep a court from making that evaluation of a critical threshold issue. Absent that evaluation, parties like Central States are free to forum shop in the most obvious and egregious manner and to file actions not yet ripe for consideration prior to the accrual of the cause of action, as long as they do it in a district separate from that in which the defendant was likely to file an action. In fact, the probability of such forum shopping makes it that much more important that a court consider the subject matter jurisdiction of both courts when applying the first-filed rule, regardless whether one of the two actions being considered was filed in another circuit.

Waiting, as Central States suggests, for the transferee court to make the determination regarding jurisdiction is not an adequate remedy because it adds substantial costs and delay to litigation that could otherwise proceed to judgment in the transferring court.

II. THERE IS A CONFLICT WITH THE DECISION OF THE COURT BELOW ON WHEN JURISDICTION FIRST ARISES OVER A WITHDRAWAL LIABILITY ACTION.

Once again, Central States focuses on form over substance, when it contends that the Eighth Circuit's decision does not represent a conflict or inconsistency with the decisions reached in other jurisdictions on this issue.

Central States admits that it filed its Illinois case before Midwest received its notice and demand for withdrawal liability and before payments under the notice and demand were to become due. See Brief in Opposition, p. 2. The impact of the Eighth Circuit's decision is that it effectively recognized the validity of an action which, on its face, was not ripe for filing. This is in direct contradiction of the holdings of every other circuit that has considered the issue of when a cause of action accrues under MPPAA. *See Debreceni v. George Lamoureaux & Co.*, 629 F. Supp. 598, 601 (D. Mass. 1986), (notice and demand are preconditions for a suit to collect withdrawal liability); *ILGWU Nat'l Retirement Fund v. Levy Bros. Frocks*, 846 F.2d 879, 887 (2d Cir. 1988) (remanded a case for determination of whether the conditions precedent to a suit for collection of withdrawal liability have been met); *Board of Trustees of District No. 15 Machinists' Pension Fund v. Kahle Engineering Corp.*, 43 F.3d 852, 860 (3d Cir. 1994) (cause of action arose when employer failed to make payment on its withdrawal liability demanded by the plan sponsor . . . the action which "adversely affected" the plan was the failure to make the scheduled payment); *Republic Industries v. Teamsters Joint Council*, 718 F.2d 628, 641 n.15 (4th Cir. 1983) (notice and cure periods are part of the statutory scheme designed to provide due process to withdrawing employers); *Central States Pension Fund v. Slotky*, 965 F.2d 1369, 1371 (7th Cir. 1992) ("[t]o trigger application of the statute, the pension plan must issue a notice and a demand for payment of withdrawal liability to the employer). Therefore, to the extent that the Eighth Circuit allowed Central States to file the Illinois case before notice was sent to Midwest and before payments became due, there is a conflict with the Eighth Circuit's decision on the question of when jurisdiction first arises over a withdrawal liability action.

Essentially, Central States argues that the decision of the Court below does not conflict with other circuits on

when jurisdiction first arises over a withdrawal liability action:

> Jurisdiction under 29 U.S.C. § 1451 is established when a pension plan is adversely affected by the act or omission of a party under ERISA. Midwest admits that it withdrew from Central States and thus, unless it succeeds on its constitutional challenge, Midwest owes Central States withdrawal liability that it has not paid. Thus, Central States had a cause of action because it was adversely affected by the *withdrawal of Midwest,* and, under 29 U.S.C. § 1451(a), Central States was entitled to sue Midwest even if it meant anticipating (correctly) by several days that Midwest would refuse to pay. (Emphasis added.)

See Brief in Opposition, p. 8. But Central States ignores the decisions in *Joyce v. Clyde Sandoz Masonry,* 871 F.2d 1119 (D.C. Cir. 1989) and *Kahle Engineering Corp., supra* at 860. In *Joyce,* the Court of Appeals for the District of Columbia held that withdrawal in itself "does not visit any adverse affect upon the plan that gives rise to [a] cause of action." 871 F.2d at 1123. Until Central States was adversely affected by the act or omission of Midwest, there was no statutory basis upon which to lay jurisdiction in Central States' Illinois action. 29 U.S.C. § 1451(a).[3] When Central States' filed its Illinois action, the cause of action had not yet accrued.[4] Thus,

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[3] It is the uncured failure by an employer to pay the sum demanded that adversely affects a plan and triggers a cause of action. *Joyce,* at 1122. Midwest has never maintained that a cause of action failed to arise merely because Central States failed to mail a "written demand letter." Central States' argument in this regard is a mere straw man. Brief in Opposition at 8.

[4] The Court of Appeals for the District of Columbia was required to determine what act or omission gives *rise* to a cause of action in order to determine what act or omission triggers the statute of limitations' time bar as applied to efforts to collect withdrawal liability. *Joyce* at 1122. This belies Central States' mischaracterization of Midwest's citations as statute of limitations' cases that do not examine the earliest date upon which a cause of action arises for purposes of bringing a lawsuit. *See*

the Illinois action was premature, not ripe, and, therefore, the district court lacked subject matter jurisdiction. *St. Clair v. City of Chico*, 880 F.2d 119, 201-02 (9th Cir. 1989). Accordingly this Court should grant Petitioner's Writ for Certiorari.

III. MPPAA REQUIRES A PLAN TO PROVIDE NOTICE AND A DEMAND FOR PAYMENT TO AN EMPLOYER BEFORE COMMENCING A LAWSUIT.

Central States argues that the statutory requisites essentially have no meaning when it comes to the determination of when a cause of action is ripe or when a court is vested with subject matter jurisdiction. Specifically, Central States argues that the pension fund can provide notice of withdrawal liability to an employer in anticipation of a refusal to pay in the form of a legal action filed in federal court alleging a default that has not yet occurred. Brief in Opposition at 8.

Central States' citation to *Bowers v. Transportation Maritima*, 901 F.2d 258 (2nd Cir. 1990), in support of its position that a federal court complaint itself constitutes sufficient notice under the MPPAA, is absurd. The *Bowers* decision stands for no such proposition. In *Bowers*, notice and demand for payment *was issued and served, twice*, some six months *before* the collection action in federal court was filed. However, a dispute arose as to whether the notices and demands for payment were properly served on the employer. Apparently in order to avoid protracted litigation of that factual dispute, the fund in that case agreed to treat the date of service of process of its complaint in federal court as the first payment due date. *Transportation Maritima*, 901 F.2d at 265. Those

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Brief in Opposition, p. 9. The answer to the question of what act or omissions gives rise to a cause of action is the same for both issues: determine when a cause of action accrues (1) for purposes of the running of a statute of limitations or (2) for purposes of bringing a lawsuit.

unique circumstances are clearly distingishable from the facts here, and Bowers certainly cannot be cited for a general proposition that a collection complaint may be substituted for notice and demand of withdrawal liability under the MPPAA scheme, which unequivocally requires determination and notification of withdrawal liability before any effort to collect is undertaken. 29 U.S.C. § 1382.

Furthermore, Central States' citation to *Central States v. Slotky*, 956 F.2d 1369 (7th Cir. 1992) in support of its position that a claim in bankruptcy may fulfill the statutory notice requirements equally is absurd. There were two notices in *Slotky*, the first a claim in bankruptcy and the second a true notice and demand. *Id.* at 1372. The Court of Appeals did not find that the first claim in bankruptcy fulfills the statutory notice requirements as Central States claims. Instead, the Court of Appeals found:

> There is a deeper objection to Slotky's argument concerning the adequacy of the plan's bankruptcy claim as notice under the Multiemployer Pension Plan Amendments. The objection is the second notice and demand to Stevens, the one sent directly, that is, outside the bankruptcy proceeding. *That notice makes the bankruptcy filing academic.*

(Emphasis added). *Id.*, at 1375.

The requirements set forth in MPPAA are not mere "technical" requirements that can be avoided. Accrual of a cause of action goes directly to the issue of when the cause of action arises under the law.[5] It also indicates

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[5] Central States also argues that Midwest became delinquent in its first payment five days after Central States filed its Complaint and, therefore, if there were a jurisdictional question in the Illinois court before May 1, there certainly could be none after May 1. Brief in Opposition at 10, n.8. Central States is wrong. The jurisdictional infirmity afflicting Central States Illinois action

when an action is ripe for consideration by a court. Central States did not simply violate a technical requirement and fail to do one of the things required by the statute. Central States failed to do *any* of the things required by the statute, and had not been adversely affected within the meaning of MPPAA, when it rushed to the courthouse to secure a more favorable forum in which to litigate its claim for withdrawal liability against Midwest. The abuse of an already-overburdened court system with the disregard for the MPPAA requirements on which all parties are supposed to rely, warrants this Court's consideration of the Petition for Certiorari filed by Midwest. Midwest respectfully submits that the Court should accept its petition and consider the issue presented on its merits.

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could not have been cured by the mere passage of time, on or after May 1, 1994. An action cannot be maintained if it is commenced before the accrual of the cause of action on which it is based, even where the cause of action accrues before the trial. 1 Am. Jr. 2d, Abatement, Survival, and Revival § 4. Further:

> Whether a cause of action has accrued is determined *according to the facts existing at the time the action was commenced.* Where an action has been commenced before the alleged cause of action has accrued, the subsequent occurrence of conditions or facts necessary to make the cause of action complete will not avail the plaintiff in maintaining his suit.

1 Am. Jr. 2d, Actions § 71 (emphasis added). (Courts may consider common law doctrines, like abatement, because of the power of the courts to develop a "federal common law" of ERISA. *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1499 (9th Cir. 1984) (development of federal common law under ERISA is necessary to fill in the gaps in the statutory scheme). Indeed, the doctrine of abatement has been relied upon by the U.S. Court of Appeals for the Sixth Circuit pursuant to this principal. *Corbin v. Blankenburg*, 39 F.3d 650, 653 (6th Cir. 1994)). Central States cannot avoid the jurisdictional defects in its Illinois action by characterizing its action as anticipatory. See Brief in Opposition, p.8. The irrefutable facts are that Central States filed this action on April 26, 1994, and its cause of action had not yet accrued on that date.

CONCLUSION

The petition for writ of certiorari should be granted to establish when a cause of action accrues under MPPAA and to establish a uniform methodology for application of the first-filed rule.

Respectfully submitted,

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